Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

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December 5, 1994

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FILED: May 4, 1994

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO,

Respondent.

(93-174; CA A83141)

Judicial Review from Land Use Board of Appeals.

Argued and submitted April 7, 1994.

Thomas H. Nelson argued the cause for petitioners. With him on the brief was Stoel Rives Boley Jones & Grey.

Jeffrey G. Condit, City Attorney, argued the cause and filed the brief for respondent.

Timothy J. Sercombe and Preston Thorgrimson Shidler Gates & Ellis filed a brief amicus curiae for League of Oregon Cities.

Before Deits, Presiding Judge, and Riggs and Haselton, Judges.

DEITS, P.J.

Affirmed.

Haselton, J., concurring.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[XX] Costs allowed, payable by: Petitioners

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

MONEY JUDGMENT

Judgment #1	Judgment #2*
Creditor: _____	State of Oregon Judicial Department
Debtor: _____	_____
Costs: _____	Unpaid filing fee:
Attorney fees: _____	
TOTAL AMOUNT: $_____	$_____

Interest: Simple, 9% per annum, from the date of this appellate judgment.

*Judgment for unpaid filing fees. ORS 21.605(1)(c).

This section to be completed when the appellate judgment issues.
See ORAP 14.05(3).

NOTICE OF EXPENSES AND COMPENSATION UNDER ORS 138.500(4)

The appellate court has affirmed the conviction in this criminal case and has certified expenses and compensation of appointed counsel. This is notice to the trial court so that it may exercise its discretion under ORS 161.665(2) to include the expenses and compensation of appointed counsel in the final judgment, in addition to transcript preparation expenses allowed by the trial court. The court has certified expenses and compensation in the amount of $_____.

This section to be completed when the appellate judgment issues.

See ORAP 14.05(3).

Appellate Judgment
Effective Date:

COURT OF APPEALS
(seal)

DEITS, P.J.

Petitioners seek review of LUBA's affirmance of the City of Lake Oswego's decision not to modify an approval condition on a previously allowed minor partition. The city declined to eliminate the condition that petitioners agree not to pursue the city's remonstrance procedure in connection with establishing a street improvement district in the vicinity of the partitioned property. We affirm.

Before addressing the merits, a preliminary matter requires comment. Petitioners' brief in this case did not include a copy of LUBA's opinion, as required by our rules. ORAP 5.50(3) and ORAP 4.60. As we explained in Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 251, 834 P2d 523 (1992), this requirement is not just a matter of form:

> "We note, preliminarily, that petitioner's brief does not have appended to it a copy of LUBA's opinion, as ORAP 5.50(3) and ORAP 4.60 require. When this court prepares for oral argument, the appellate record is not available to us. We have only the parties' briefs. Consequently, LUBA's opinion was not before us at that time, and our ability to prepare for the argument was therefore seriously hampered. Hereafter, violations of the rule will result in our striking a petitioner's brief on our own motion."

In the present case, the city's brief does contain the LUBA opinion as an appendix. This allowed us to effectively prepare for argument. However, we again emphasize the importance of this requirement.

We turn to the merits. Section 40.050 of the City Code provides:

> "Filing of Remonstrance to Formation of Improvement District; Defeat of Proposal by Remonstrance.
>
> "(1) Objections by property owners within the proposed district to the formation of the proposed improvement district must be in writing, and filed with the Recorder not later than the close of business the day of the hearing set forth in LOC 40.060. Except as provided by Section 37 of the Lake Oswego Charter, any proposal to levy and collect any special assessment under this chapter shall be suspended for six months upon written remonstrance of two-thirds of the owners of property to be assessed.
>
> "(2) Oral objections will be considered at the hearing provided in LOC 40.060. However, oral objections shall not be counted for the purpose of suspending the project as provided in subsection (1) of this section."

Petitioners contend that the prohibition of their pursuing the remonstrance procedure infringes their communicative rights under Article I, section 8, and under the First Amendment. The city construed section 40.050 in the context of related code provisions, and rejected petitioners' argument. Its order recites:

> "* * * Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of [limited improvement districts (LIDs)]. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to

determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for 6 months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.

"LOC 40.050(2), however, expressly authorizes and requires the [City] Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows 'all persons' to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object or otherwise testify regarding the LID on the merits."

LUBA expressed some uncertainty about whether the deferential standard of review under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), is applicable to the city's interpretation

of its prior decision imposing the condition, as distinct from an interpretation of the city's legislation itself. See ORS 197.829; but see Terraces Condo. Assn. v. City of Portland, 110 Or App 471, 477, 823 P2d 1004 (1992). We are also unsure whether Clark can mandate deference when the local interpretation affects asserted constitutional rights, including federal rights. Like LUBA, however, we find it unnecessary to resolve what the standard of review is because, like LUBA, we would independently arrive at the same interpretation the city did: the remonstrance procedure, and the so-called nonremonstrance condition, affect only petitioners' right to be counted in the extraordinary majority that can abate the decision for six months; they do not limit petitioners' right to speak on the proposed district or any related matters, orally or in writing.

Consequently, as the city and the amicus argue, the nonremonstrance condition does not regulate speech, but simply makes a particular procedure unavailable to petitioners for delaying an action that they are free to express themselves about in any way. We agree with the city that its regulations and the condition do not restrict or regulate speech. Three of petitioners' four assignments fail for that reason. Petitioners' fourth assignment of error is that the nonremonstrance agreement "impairs voting rights." For the reasons discussed by LUBA, we do not find this argument persuasive.'

Affirmed.

FOOTNOTES

[1] The city's order also explained the purposes of the nonremonstrance requirement. In essence, it is an alternative to imposing a condition on particular developmental approvals that the individual applicant make any street improvements that the development necessitates. The objective is apparently to promote efficiency and to spread costs by having a district-wide improvement mechanism instead of requiring improvements in connection with each application. According to the city's uncontested finding, an applicant's acceptance of the nonremonstrance condition is shown "on the face of the nonremonstrance agreement" to be in consideration for the city's "waiver of the requirement for immediate construction." Petitioners do not appear to argue that the condition violates the Fifth Amendment or Article I, section 18.

[2] The concurring opinion correctly describes the narrow basis for our holding. Because that is the basis for our holding, however, it is unnecessary for us to reach, and we do not reach, the constitutional issue that the last sentence of the concurrence addresses.

HASELTON, J., concurring.

I write only to emphasize the narrow basis of our holding. The "nonremonstrance" condition at issue in this case referred to a specific procedure described in the city's code, and not to a general right to oppose governmental action. An attempt by a governmental body to condition receipt of a public benefit on waiver of such a general right to "remonstrate" would raise constitutional issues not presented here.

49.025 Interpretation, Regulations and Procedures.

The City Manager shall have the initial authority and responsibility to interpret all terms, provisions and requirements of this chapter. A request for an interpretation of this chapter shall be made in writing and may be appealed pursuant to the provisions of LOC 49.630. The City Manager may develop regulations and procedures to aid in the implementation and interpretation of the provisions of this chapter. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.030 Fees and Deposits.

Fees and deposits for applications, plans reviews, inspections, appeals, transcripts or any other action pursuant to this chapter shall be established and adjusted by City Council resolution. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.035 Enforcement.

It shall be the duty of the City Manager to enforce this chapter and to insure that conditions of approval of a development permit are properly carried out. (Ord. No. 1807, Sec. 1; 9-15-81.)

49.040 Penalties.

Any person who fails to comply with, or who violates, any provision of this chapter, or who fails to carry out the terms and conditions of any approval of development, shall be subject to a fine of not less than $50.00 or more than $500.00 per violation. Each day that the violation exists shall constitute a separate violation. Failure of City staff to comply with the time limits for

processing applications does not constitute a violation of this chapter. (Ord. No. 1807, Sec. 1; 9-15-81.)

(Rev. 8-18-92; bp) 280.10

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM LARSSON and DEBRA LARSSON,	)	LUBA No. 93-174
Petitioners,	)	FINAL OPINION AND ORDER
v.	)	
CITY OF LAKE OSWEGO,	)	
Respondent.	)	

Appeal from City of Lake Oswego.

Thomas H. Nelson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoel Rives Boley Jones & Grey.

Jeffrey Condit, City Attorney, Lake Oswego, filed the response brief and argued on behalf of respondent.

KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

AFFIRMED 02/08/94

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the city council denying, in part, their request to modify conditions of approval for a previously approved partition.

FACTS

The subject property is a residential parcel located within the City of Lake Oswego. The challenged decision states the following additional facts:

> "The original minor partition * * * was approved by staff on April 16, 1990, as a 'minor development' pursuant to [Lake Oswego Code (LOC)] 49.140(1)(H). Minor developments are staff decisions, subject to notice and an opportunity to appeal. Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approval in order to protect the public, implement the requirements of the Comprehensive Plan and [LOC] Chapter 49, and/or to fulfill a need for public services created or increased by the proposal. LOC 49.620(1)(A), (B) and (C). These conditions include [c]ondition 3, which required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road; and [c]ondition 11, which required the applicants to post a cash deposit for the purpose of constructing a pathway along Iron Mountain Boulevard.

> The applicants did not appeal [the previous minor partition decision] and subsequently executed the non-remonstrance agreement and paid the pathway deposit. The partition was completed, the new parcel (parcel 2) was sold and a new dwelling was constructed on the new parcel during the summer of 1990. The applicants retained [the remainder of the original parcel (parcel 1)], which is occupied by a preexisting dwelling.
>
> "The applicants subsequently filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to parcel 1. * * * Staff denied the request * * *. The applicants appealed the decision to the Development Review Board [(DRB)] pursuant to LOC 49.225, which held a de novo hearing and denied the modification * * *. Applicants then appealed the DRB's decision to the [City] Council." Record 9-10.

After a public hearing, the city council issued an order modifying the minor partition approval by deleting condition 11, but denying petitioners' request to delete condition 3.[1] This appeal followed.

INTRODUCTION

Most of petitioners' arguments are principally directed at deficiencies associated with the non-remonstrance agreement they executed with the city pursuant to condition 3. However, the proceedings below were, and indeed the challenged decision is, concerned solely with the question of whether condition 3 should be deleted from a prior, unappealed, city partition decision.

---

[1] The portion of the decision that deletes condition 11 is not challenged, and we do not consider it further.

Therefore, the only issue before us is whether the challenged city decision refusing to delete condition 3 is erroneous.[2]

The challenged decision states as follows:

> "* * * The [City] Council concludes that requiring an applicant for a partition to sign a non-remonstrance agreement to allow future improvement of a substandard City street is reasonably related to mitigating the impacts of the partition on that public facility, and is more practical and less onerous on the property owner than requiring immediate construction of a half-street improvement or denying all development which increases density or intensity of use until the street is improved." Record 18.

Petitioners do not challenge these findings.

In its brief for this appeal the city explains its understanding of what is not in dispute in this appeal proceeding:

> "[P]etitioners did not and do not contest any of the City's findings and conclusions as they relate to the evidence in the record or to the local code requirements. Based upon these uncontested findings and conclusions, the non-remonstrance agreement condition is directly related to mitigating the impact created by the partition and,

---

[2] That the agreement petitioners executed pursuant to condition 3 may or may not accurately reflect the requirements of condition 3 is an issue not before us in this appeal proceeding. Issues associated with the validity of the agreement itself may well arise if the city chooses to enforce the condition. However, the validity of the agreement is not presented in this appeal, and we do not consider it further.

therefore, more than survives scrutiny under [Parks v. Watson, 716 F2d 646 (9th Cir 1983)]." Respondent's Brief 26.

Similarly, we do not understand petitioners to contest that condition 3 is directly related to the city's original partition approval. Further, there is no contest that condition 3, together with other conditions of approval, was imposed as an alternative to denial of petitioners' original partition proposal. In this regard, there is no dispute the city could have required petitioners to construct their fair share of improvements to the substandard roadway on which the subject property fronts, instead of imposing condition 3.

FIRST ASSIGNMENT OF ERROR

"The non-remonstrance agreement violates the right to freedom of speech under the First Amendment to the U.S. Constitution."

SECOND ASSIGNMENT OF ERROR

"The non remonstrance agreement violates Article I, Section 8, of the Oregon Constitution."

THIRD ASSIGNMENT OF ERROR

"The city's conditioning the approval of a partition on petitioners' entering into a non-remonstrance agreement was illegal."

Disputed condition 3 provides:

> "The applicant[s] shall provide the City a signed agreement of non-remonstrance and petition for future street improvements anticipated in Iron Mountain Boulevard and Chandler Road. This agreement shall apply to all parcels approved and be binding on subsequent owners." Record 140.

There is no specific definition in the city code of the terms remonstrance or non-remonstrance. However, the challenged decision interprets remonstrance and non-remonstrance, in the context of condition 3, as follows:

> "* * * Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of [limited improvement districts (LIDs)]. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for 6 months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.
>
> "LOC 40.050(2), however, expressly authorizes and requires the [City] Council to consider oral objections to the project at the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections

> will be considered at the public hearing. LOC 40.060(2) expressly requires the [City] Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows 'all persons' to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object or otherwise testify regarding the LID on the merits. Based upon this express language, the [City] Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the [City] Council in violation of the [Oregon and United States Constitutions]." (Emphasis supplied.) Record 14-15.

Petitioners advance a number of reasons why they believe condition 3 is unconstitutional. Essentially, petitioners contend condition 3 is impermissibly vague and violates their right to free expression under the First Amendment to the United States Constitution and Article I, section 8, of the Oregon Constitution. We address these contentions below.

A. Vagueness and Overbreadth

1. Introduction

Petitioners contend condition 3 is impermissibly vague and overbroad under both the United States and Oregon constitutions. The legal analysis applied to vagueness and overbreadth challenges under both the United States and Oregon constitutions are

essentially the same. See State v. Plowman, 314 Or 157, 162, 838 P2d 558 (1992) (vagueness); City of Hillsboro v. Purcell, 306 Or 547, 556 n 8, 761 P2d 510 (1988) (overbreadth). The most significant difference between the legal analysis applied to claims concerning restrictions on free expression under the First Amendment to the United States Constitution and claims under Article I, section 8, of the Oregon Constitution has to do with the merits of such claims, not with whether the restricting law is vague or overbroad. Article I, section 8, of the Oregon Constitution permits no direct limitation on the exercise of free expression, whereas the First Amendment to the United States Constitution permits some limitations on certain classes of speech, i.e. obscenity and commercial speech. Compare State v. Robertson, 293 Or 402, 435, 649 P2d 569 (1982); Tidyman v. City of Portland, 306 Or 174, 759 P2d 242 (1988), with Metromedia Inc v. San Diego, 453 US 490, 101 S Ct 2882, 69 L Ed2d 800 (1981); Young v. American Mini Theaters, 427 US 50, 96 S Ct 2440, 49 L Ed2d 310 (1976); see also Lehman v. City of Shaker Heights, 418 US 298, 94 S Ct 2714, 41 L Ed2d 770 (1974). We address petitioners' vagueness and overbreadth challenges before addressing the merits of their constitutional claims.

2. Vagueness

Because the terms remonstrance and non-remonstrance are not defined in either the city code or the challenged condition, condition 3 is ambiguous. However, the fact that condition 3 contains an ambiguous term does not, of itself, establish that condition 3 is unconstitutionally vague. See State v. Plowman, supra, 314 Or at 160 (a reasonable degree of certainty about the kind of conduct falling within a statute's prohibition is required; but absolute certainty is not). Clearly, regulations purporting to limit "speech" are vulnerable to vagueness challenges. See State v. Henry, 78 Or App 392, 396, 712 P2d 189, rev'd 302 Or 510 (1987). However,

some ambiguity is allowed where the ambiguous language is circumscribed by reference to specific, non-vague regulations. See Juv. Dept. v. D, 27 Or App 861, 866, 557 P2d 687 (1976). In the instant case, Condition 3 is circumscribed by relatively clear LOC regulations.

In Davidson v. Oregon Government Ethics Comm., 300 Or 415, 425, 712 P2d 87 (1985), a public official challenged an ethics statute under which he had been prosecuted for civil violations. In determining the ethics statute was not vague, the court observed:

> "The rule against vagueness does not invalidate every law that leaves room for two or more interpretations on which legislators, lawyers and courts may differ; most laws do. Nor does any rule require that one must be able to predict with certainty the application of the law to every hypothetical set of facts. * * *" Id.

After reviewing controlling authorities, we believe the vagueness issue presented here may be framed as whether reasonable applicants can understand what they must do to comply with condition 3. See Anderson v. Peden, 284 Or 313, 324, 587 P2d 59 (1978); Oswego Properties, Inc. v. City of Lake Oswego, 108 Or App 113, 814 P2d 539 (1991); Lee v. City of Portland, 57 Or App 798, 646 P2d 662; ORS 227.173(1).

The city has specifically interpreted condition 3. Where the interpretative question centers on a local government's interpretation of its prior decision, we have previously said that, under the Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), standard of review, we must defer to such an interpretation. This is because it is a local government interpretation of locally adopted "applicable law." Perry v. Yamhill County, ____ Or LUBA ____

(LUBA No. 93-072, October 7, 1993), slip op 10, aff'd 125 Or App 588 (1993). However, ORS 197.829, which became effective November 4, 1993, may have changed this requirement that LUBA defer to local interpretations of prior local decisions. Under ORS 197.829, LUBA is required to defer to a local government's interpretation of "its comprehensive plan and land use regulations * * *." ORS 197.829 does not specifically require that LUBA defer to local interpretations of prior local decisions. Consequently, it is unclear under ORS 197.829, whether LUBA is to defer to a local government's interpretation of a prior decision or whether LUBA is required to determine whether the local government interpretation of a prior decision is reasonable and correct. See McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

In this appeal, however, we need not determine whether ORS 197.829 changes our scope of review of local government interpretations of prior decisions. As we explain below, the city's interpretation is a reasonable and correct interpretation of the LOC provisions governing the formation of LIDs and, therefore, of condition 3. Thus, we would uphold the city's interpretation of condition 3 regardless of the degree of deference owed to that interpretation.[3]

The only references to the term "remonstrance" in the LOC provisions governing the formation of LIDs refer to a specific kind of written objection, required to be filed with a particular person, in a particular manner, within a particular period of time. LOC 40.050. LOC 40.050(1) specifically distinguishes between written

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[3] We also note we must adopt a constitutional interpretation of local law over an interpretation that renders the local law unconstitutional, and that "[u]nconstitutionality is not to be presumed." Miotke v. Gladden, 250 Or 466, 468, 443 P2d 612 (1968).

remonstrances and oral objections. LOC 40.050(1) requires written remonstrances be filed with the city recorder by the "close of the business day of the hearing." Oral comments at the public hearings concerning the formation of LIDs are uniformly referred to in the LOC as oral objections. Further, there is a specific consequence associated with the filing of remonstrances by a 2/3 majority of the affected property owners--an LID proposal is suspended for a period of six months.

We agree with the city that the terms of condition 3 are clear enough for petitioners to understand what is expected of them. Read in context with the LOC Chapter 40 provisions condition 3 is designed to implement, petitioners are required to execute an agreement that they will not file a LOC 40.050(1) remonstrance with the city recorder. We also conclude it is sufficiently clear that condition 3 does not purport to limit petitioners' presentation of oral objections at public hearings on the LIDs, or to prevent petitioners from making any other form of written objection to a proposed LID, other than a remonstrance under LOC 40.050(1).

Condition 3 is not impermissibly vague.

This subassignment of error is denied.

3. Overbreadth

Petitioners claim condition 3 is overbroad. Overbreadth in this context refers to legislative action having a sweep so broad that it unreasonably limits constitutionally protected activity. Broadrick v. Oklahoma, 413 US 600, 93 S Ct 2908, 2916, 2918, 37 L Ed2d 830 (1973). An overbroad law is one which is not "limited to and contained by the consequences the law seeks to prevent." City of Hillsboro v. Purcell, supra, 306 Or at 556; see

also State v. Plowman, supra, 314 Or at 164, and cases cited thereat.

We note at the outset that it is difficult to apply the overbreadth doctrine to a quasi-judicial decision interpreting a previously imposed condition of approval. It may be that petitioners mean to allege the LID provisions in the city code are themselves overbroad. However, if this is their claim, we believe petitioners should have made such a claim in an appeal of the city's original partition decision. This is because here, the challenged decision purports to justify only the existence of condition 3 on the basis of its LOC provisions relating to LIDs. We do not understand the city's decision to have opened the door for a general inquiry into whether the city's LID provisions are facially unconstitutional.

In any case, we do not believe either condition 3, or the LID provisions condition 3 implements, are overbroad under either the United States or Oregon Constitutions. In Broadrick v. Oklahoma, supra, 93 S Ct at 2918, the United States Supreme Court stated the following with regard to the overbreadth doctrine:

> "* * * Application of the overbreadth doctrine * * * is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.
>
> "* * * * *
>
> "[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the disputed statute] is not substantially overbroad and

> that whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." (Citations omitted.)

Here, petitioners have not established the challenged decision does anything that gives condition 3 a "sweep" that substantially exceeds the boundaries of legitimate government regulation. In this regard, it is critical that petitioners do not challenge the city's findings that condition 3 is "reasonably related to mitigating the impacts of the partition" on the substandard city street on which both parcel 1 and parcel 2 front. Record 18. Finally, petitioners have not established the limiting construction the city placed on both its LOC LID provisions and condition 3 is inadequate to avoid claims that condition 3 is overbroad.

This subassignment of error is denied.

B. Freedom of Expression

Petitioners argue condition 3 unconstitutionally requires relinquishment of their constitutionally protected rights to address their government and object to a proposed LID. Petitioners characterize this as an infringement upon their rights to political speech.

We determine above the only limitation condition 3 imposes is that petitioners may not file remonstrances against the formation of certain LIDs; meaning petitioners may not avail themselves of a specific process that under some circumstances will result in a six month suspension of the proposal to form a LID. Stated another way, condition 3 simply states that in exchange for a partition approval, to which petitioners would not otherwise be entitled, petitioners must agree not to file remonstrances against

the formation of certain street improvement LIDs with the city recorder under LOC 40.050(1). Condition 3 does not forbid petitioners from filing any other written objection with the city concerning a proposed LID or from testifying at public hearings on such a proposal.

1. First Amendment

The First Amendment to the United States Constitution proscribes laws:

> "* * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. Nature of Condition 3

The United States Supreme Court has stated the guarantee of free expression embodied in the First Amendment prohibits:

> "[A]ny action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. * * *" Bigelow v. Virginia, 421 US 809, 829, 95 S Ct 222, 44 L Ed2d 600 (1975)

The United States Supreme Court has noted in First Amendment cases that it is important to distinguish between governmental compulsion and conditions relating to governmental benefits. Boden v. Roy, 476 US 693, 705, 106 S Ct 2147, 2155, 90 L Ed2d 735 (1986); see Blackwell v. City of St. Charles, 726 F Supp 256, aff'd 917 F2d 1150 (8th Cir 1990). Condition 3 falls into the latter category. This is because conditions related to the acquisition of governmental benefits, even those that may impinge

on a constitutionally protected right such as expression, are permissible if there is a legitimate governmental purpose advanced by the condition, and the governmental benefit is not one to which the person is legally entitled. Boden v. Roy, supra; Blackwell v. City of St. Charles, supra.

In Parks v. Watson, supra, 716 F2d at 653, the court stated that:

> "[C]onditions requiring the relinquishment of a constitutional right have been upheld when the condition was related to a benefit conferred."

In Parks, the court invalidated a condition of approval because it was unrelated to the benefit conferred. Here, there is no challenge to the city's findings that condition 3 is directly related to the impact created by the approved partition. Further, the city correctly states in its brief:

> "[Petitioners] could have avoided [condition 3] by building a one-half street improvement but chose not to pursue that option." Respondent's Brief 3.

Condition 3 is remarkably similar to a condition of annexation approval analyzed by the Washington Court of Appeals in Five Mile Prairie v. City of Spokane, 51 Wash App 816, 755 P2d 836 (1988). In Five Mile Prairie, the court determined a city condition requiring land owners to support an annexation proposal was not an unconstitutional infringement on the land owners' First Amendment free expression guarantees. It was persuasive to the court in Five Mile Prairie that (1) the annexation support condition was clear, (2) the condition was not coerced, and (3) the land owners were given an opportunity to voice their opposition to the annexation proposal, in any event.

Similarly, here the terms of condition 3 are reasonably clear when read in the context of the LOC provisions the condition implements. Further, there is no evidence the city coerced petitioners to accept condition 3. Petitioners had at least three options, and they chose condition 3. Those options included (1) accepting denial of their partition application or appealing a denial decision, (2) paying for a one-half street improvement before partitioning the property, and (3) accepting condition 3. Petitioners accepted condition 3, partitioned their property, accepted the benefits of that partition by selling the partitioned piece and retaining the remainder, and then requested relief from condition 3. This is a far cry from establishing that petitioners were coerced into accepting condition 3. Finally, under condition 3 petitioners are given ample opportunity to object to the proposed formation of an LID. They simply cannot avail themselves of a remonstrance under LOC 40.050(1).

Another case provides analytical guidance on the validity of condition 3. In Blackwell v. City of St. Charles, supra, a city required as a condition of water and sewer hookup approval that affected landowners sign a petition for voluntary annexation. The landowners challenged the condition as an unconstitutional restriction on their rights to free expression. The court in Blackwell v. City of St. Charles, supra, 726 F Supp at 258 (1989), determined the condition did not violate the First Amendment as follows:

> "Plaintiffs' first amendment claim is without merit. * * * First, the Court finds plaintiffs' characterization of the required assent to annexation as compelled political speech to be rather strained. The signing of the petition is not a 'compulsion to declare a belief,' nor a communication of ideas, nor 'a symbol of adherence to

government as presently organized,' nor an acceptance of political ideas; it does not require 'affirmation of a belief and an attitude of mind.' * * *

"Second, even if the political speech characterization is accepted, the first amendment is not implicated by a rational requirement of assent to a particular proposition in order to obtain a benefit to which the would-be recipient has no legal entitlement. In the freedom of religion context, the Supreme Court has noted the importance of the distinction between governmental compulsion and conditions relating to governmental benefits. * * * The same distinction is applicable in the sister first amendment context of free speech.

"Furthermore, only in the governmental compulsion context would the 'least restrictive means' test, on which plaintiffs rely, come into play. Here, [the city] meets its burden when it demonstrates that the challenged requirement 'is a reasonable means of promoting a legitimate public interest.' * * * The distinction between governmental compulsion and conditions relating to governmental benefits, and the corresponding difference in the government's burden to justify the challenged practice, preclude relief for plaintiffs on first amendment grounds.

"The consent to annexation requirement is not compulsory in the constitutional sense. It is 'forced' upon plaintiffs only in the sense that it is a contract term which they must accept in order to obtain the city's agreement to provide them with water. Conversely, plaintiffs may reject the required assent as too high a price for the benefit they seek. * * * [I]t is a 'government regulation that indirectly and incidentally calls for a choice between

> securing a governmental benefit and adherence to [political preferences].'" (Emphasis supplied; citations omitted.)

We conclude condition 3 does not impermissibly infringe on petitioners' rights to freedom of expression guaranteed by the First Amendment to the United States Constitution. Nothing about condition 3 allows or requires the city to disregard petitioners' political views about LIDs. Condition 3 limits one method for objecting to the formation of a LID, but leaves petitioners free to object to a proposed LID in a variety of other ways.

Further, as stated above, there is no evidence of coercion in the imposition of condition 3. Nothing indicates condition 3 is not the result of an arms-length transaction between the city and petitioners. Petitioners do not dispute they received a benefit from the city as a result of that transaction (approval of the partition of their property). Clearly, part of that benefit included not immediately having to contribute funds to improve the substandard street upon which the subject property fronts, or to improve that part of the street themselves.

The First Amendment does not forbid the city from imposing condition 3 in the circumstances presented here.

b. Waiver

In the alternative, to the extent condition 3 may offend the First Amendment (although we do not believe it does), we believe the circumstances presented here establish that petitioners waived any First Amendment protection.

Cases demonstrate the First Amendment does not forbid the waiver or relinquishment of what is otherwise a constitutionally

protected right in the circumstances presented here, so long as the waiver is voluntary and knowing. Leonard v. Clark, 758 F Supp 616, 619 (DC Or 1991), provides a legal analysis relevant to determining the validity of condition 3.[4] In Leonard, a union entered into a collective bargaining agreement restricting the union's ability to endorse and sponsor legislative issues involving benefit improvements that could result in higher payroll costs for the city. The court described the following factors as relevant in determining the validity of a contractual waiver of a First Amendment right:

> "[T]he United States Supreme Court outlined the factors to be considered in determining whether there has been a valid contractual waiver of a constitutionally guaranteed right. These factors were summarized by the Third Circuit Court of Appeals in Erie Telecommunications, Inc. v. City of Erie, Pa., 853 F.2d 1084, 1097 (3rd Cir. 1988). In Erie, the court held that a party is deemed to have voluntarily waived its constitutional rights through a contract where 1) the parties to the contract have bargaining equality; 2) the parties have negotiated the terms of the contract; and 3) the waiving party is advised by competent counsel and has engaged in other contract negotiations." Leonard, supra.

We conclude condition 3 was voluntarily accepted by petitioners as an alternative to having to make current expenditures of money toward the street improvements condition 3 furthers, or to having their original partition application denied. The circum-

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[4] Although Leonard involves a contract waiver of constitutionally protected speech rights, and not a condition of approval adopted in a quasi-judicial decision as is the case here, we believe the principles expressed by the court in Leonard are analytically relevant.

stances establish petitioners knew exactly what they were giving up when they accepted condition 3, and failed to take advantage of reasonable opportunities to object to the condition, i.e. by filing an appeal.[5] Therefore, with regard to condition 3, petitioners have waived their First Amendment rights.

This subassignment of error is denied.

2. Article I, Section 8

Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for abuse of this right."

a. Nature of Condition 3

There are essentially three lines of cases dealing with the scope of the prohibition on laws restricting freedom of expression established by Article I, section 8. None are dispositive in the circumstances presented here, but all provide legal principles relevant to assisting the analysis of whether condition 3 constitutes an impermissible limitation on petitioners' rights under Article I, section 8.

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[5] We note that it is unclear whether petitioners were represented by legal counsel during the city proceeding leading to the original partition approval decision. However, the original partition decision was made at the city staff level. Therefore, in any event, it is unlikely the city had the benefit of legal counsel.

The first line of cases involves criminal laws that directly or indirectly restrict the content of expression. Compare State v. Robertson, supra (criminal laws punishing certain expressive conduct are unlawful under Article I, section 8), with State v. Plowman, supra (criminal intimidation law is not invalid as it punishes only forbidden effects of expressive conduct). In State v. Plowman, the court determined that an element of criminal intimidation requiring action based on the actor's "perception of the victim's race, color, religion, national origin, or sexual orientation," did not proscribe Article I, section 8 rights to free expression, but rather prohibited unlawful effects. The court explained the distinction in this way:

> "* * * One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group. * * *" State v. Plowman, supra, 314 Or at 165.

The second line of cases deals with the kinds of constitutionally permissible remedies available for abuse of the right to free expression. Wheeler v. Green, 286 Or 99, 119, 593 P2d 777 (1979) (punitive damages in defamation cases are unconstitutional under Article I, section 8, because they can "easily inhibit the exercise of freedom of constitutionally protected expression * * *"); see also Huffman and Wright Logging Company v. Wade, 317 Or 445, 458-59, _____ P2d _____ (1993) (Article I, section 8 does not prevent the award of punitive damages for the tort of trespass despite the fact that such damages may incidentally punish those who protest against logging practices); Hall v. The May Dept. Stores, 292 Or 131, 145-47, 637 P2d 126 (1981).

The final line of cases deals with the enactment or application of civil laws which have the effect of directly or indirectly limiting expressive rights. Under these cases, laws that directly and absolutely prohibit expressive conduct rather than forbidden effects are invalid under Article I, section 8. Tidyman v. City of Portland, supra. On the other hand, laws which may have an indirect effect of limiting expression are permissible so long as they are reasonably related to a legitimate governmental purpose and are reasonable in scope. See Davidson v. Oregon Government Ethics Comm., supra. In this regard, the court in Tidyman, supra, 306 Or at 183, observed:

> "A regulation is not always unconstitutional because it restricts one's choice of a place or time for self-expression * * * when that is not the object of the regulation. The concern may be with the medium, not the message, as when park regulations ban fireworks even for a Fourth of July celebration. To decline an exception from a land-use regulation for a theater, a printing plant or a church differs from attempting to restrict prayer meetings, film showings or desk-top publishing in a residence, or in turn enforcing safety codes or parking regulations when a residence is so used. * * * This court has never held that an otherwise valid restriction must cover all or nothing * * *."

Under these authorities, it is clear Article I, section 8 forbids passage of any law absolutely and directly restraining free expression.[6] State v. Robertson, supra; Ackerly Communications,

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[6] It appears the strict prohibition in Article I, section 8 refers only to the passage of laws, i.e. legislative enactments, and does not answer the question presented here concerning conditions of approval in quasi-

(continued...)

Inc. v. Mult. Co., 72 Or App 617, 696 P2d 1140 (1985). However, the line between regulations absolutely and directly restraining free expression and those proscribing only prohibited effects is not bright. See State v. Plowman, supra; Huffman and Wright Logging Company v. Wade, supra. It is also clear that reasonable regulations limiting the manner of the exercise of free expression are valid under Article I, section 8. Tidyman v. City of Portland, supra; State v. Henry, 302 Or 510, 525, 732 P2d 9 (1987); State ex rel Oregonian Pub. Co. v. Deiz, 289 Or 277, 287, 613 P2d 23 (1980).

At the outset, we note condition 3 does not fit neatly into the category of a reasonable regulation limiting the manner of speech. Neither does condition 3 fit neatly into the category of a regulation proscribing impermissible effects of free expression. However, condition 3 also does not fit neatly into the category of an outright prohibition on the content of expression. Therefore, we must determine which type of regulation condition 3 most resembles.

We state above that condition 3 does no more than limit the manner of exercise of petitioners' rights to oppose an LID, and that petitioners are only prohibited from submitting an LOC 40.050(1) remonstrance potentially suspending action on an LID for six months. Petitioners are free, however, to oppose an LID by other forms of written communication or by presenting

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[6](...continued)
judicial land use decisions. While a quasi-judicial decision certainly results in the adoption of local law applicable to a particular piece of property, it is unclear how such a decision fits into the prohibition stated in Article I, section 8. In any event, for purposes of resolving this assignment of error, we assume without deciding that Article I, section 8 potentially limits the authority of the city to impose a condition of approval such as condition 3.

testimony at city LID hearings. Therefore, we conclude that condition 3 is most analogous to a reasonable limitation on the manner of the exercise of petitioners' right to free expression. Such a limitation does not violate Article I, section 8.

This subassignment of error is denied.

b. Waiver

To the extent we may be incorrect in concluding that condition 3 does not offend Article I, section 8, we consider in the alternative whether petitioners waived their rights under Article I, section 8.

In Oregon, waiver is uniformly held to be the "relinquishment of a known right." In re Jordan, 290 Or 669, 672-73, 624 P2d 1074 (1981); see Drews v. EBI Companies, 310 Or 134, 150, 795 P2d 531 (1993); see also Lyons v. Pearce, 298 Or 554, 560-63, 694 P2d 969 (1985). In Carrier v. Hicks, 316 Or 341, 352, ___ P2d ____ (1993), the court held the fact that a complainant voluntarily entered into arbitration pursuant to ORS 742.504(1), instead of demanding a jury trial of an uninsured motorist claim, was enough to constitute a voluntary waiver of the constitutionally guaranteed right to jury trial. Accord Mazorol v. Coats, 316 Or 367, ____ P2d ____ (1993). From Carrier v. Hicks, it appears the waiver threshold for constitutional rights is a relatively easy one to cross. Therefore, even if condition 3 can be read to be an absolute prohibition on petitioners' rights under Article I, section 8, we are persuaded that the circumstances described in the preceding sections clearly demonstrate that petitioners voluntarily and knowingly waived the right to file a LOC 40.050(1) remonstrance in exchange for the partition approval. See Leonard v. Clark, supra.

This subassignment of error is denied.

3. Conclusion

Petitioners have not established how condition 3 violates either the First Amendment to the United States Constitution or Article I, section 8, of the Oregon Constitution, and we do not see that it does. In addition, even if condition 3 offends those constitutional provisions, petitioners have failed to establish they have not waived those rights.

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

"The non remonstrance agreement impairs voting rights."

Petitioners argue condition 3 violates ORS 260.665(2)(a) through (c), which prohibits "undue influence" on a person either not to vote at all or to vote in a particular manner.

There are several reasons why this assignment of error provides no basis for reversal or remand of the challenged decision. We address two of them.

First, we state above the city exercised no "undue influence" over petitioners in imposing condition 3. Second, under condition 3, petitioners are neither prevented from voting nor required to vote in any particular manner on a proposed LID. As we state above, the limitation imposed by condition 3 is very narrow. Petitioners simply may not pursue a remonstrance against the formation of an LID under LOC 40.050(1), but are free to participate in the city's LID process in all other respects.

The fourth assignment of error is denied.

The city's decision is affirmed.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 93-174, on February 8, 1994, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Thomas H. Nelson
Stoel, Rives, et al
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204

Jeffrey Condit
City Attorney
PO Box 369
Lake Oswego, OR 97034

Dated this 8th day of February, 1994.

Jan Zwemke
Office Manager

BEFORE THE CITY COUNCIL
OF THE CITY OF LAKE OSWEGO

AN APPEAL OF SD 56-89	)	
(Mod. 7-92) /AP 93-01-1002,	)	AP 93-05-1025
A DEVELOPMENT REVIEW	)	(William and Debra Larsson)
BOARD DENIAL OF A	)	FINDINGS, CONCLUSIONS
REQUEST TO MODIFY AN	)	& ORDER
APPROVED MINOR PARTI-	)	
TION BY ELIMINATING	)	
TWO CONDITIONS OF	)	
APPROVAL	)	

NATURE OF APPEAL

This proceeding is an appeal by William and Debra Larsson (appellants) of a decision of the Development Review Board (DRB). The applicant is seeking to modify an earlier partition approval (SD 56-89) which enabled the creation of two parcels from an 86,058 square foot lot. The parcels created are 20,078 and 65,980 square feet in size. The applicant seeks the elimination of two conditions of approval (Conditions Number 3 and 11) as they regard Tax Lot 3400 (Parcel 1). The site is located at the southwest corner of intersection of Chandler Road and Iron Mountain Blvd. (Tax Lot 3400 of Tax Map 2 1E 3CC).

HEARINGS

The Development Review Board held a public hearing and considered this application at its meetings of April 5 and 19, 1993. The City Council held a public hearing and considered the appeal at its regular meeting of September 7, 1993.

CRITERIA AND STANDARDS

A. City of Lake Oswego Comprehensive Plan:

Urban Service Boundary Policies
General Policy III, Specific Policy 4

Impact Management Policies
General Policy I, Specific Policy 1
General Policy II, Specific Policy 1,2,3
General Policy III, Specific Policy 1

Residential Site Design Policies
General Policy IV, Specific Policy 2,3
General Policy V, Specific Policy 1

Bikeway Policies
General Policy I, Specific Policy 2,3,6

Pedestrian Pathways Policies
General Policy II, Specific Policy 1

Transportation Policies
General Policy II, Specific Policy 1
General Policy IV, Specific Policy 7
General Policy VI, Specific Policy 3

B. City of Lake Oswego Zoning Ordinance:

LOC 48.015	Definitions
LOC 48.195-48.225	R-10 Zone Description (set-backs, lot area, lot coverage)
LOC 48.535(3)	Special Street Setbacks
LOC 48.820	Restrictions and Conditions

C. City of Lake Oswego Development Code:

LOC 49.015(36)	Definition; Public Facilities
LOC 49.090	Applicability of Development Standards
LOC 49.125	Authority to Approve Changes in Development Permits
LOC 49.140	Minor Development
LOC 49.200-49.210	Minor Development Procedures
LOC 49.215	Authority of City Manager
LOC 49.225	Appeals
LOC 49.615	Criteria for Approval
LOC 49.620	Conditional Approvals
LOC 49.630	Appeals of City Manager Action

D. City of Lake Oswego Development Standards:

14.005 - 14.040	Utility Standard

E. City of Lake Oswego Pathways:

LOC 42.900 - 42.920
LOC 44.374

CONCLUSION

The City Council heard the testimony of the appellants and reviewed the record made before it and the DRB, and affirms the DRB's decision to retain condition 3, which imposed a non-remonstrance agreement to formation of a future LID for street improvements along Iron Mountain Boulevard and Chandler Road, and modifies the DRB's decision by deleting the condition 11, which imposed a bikeway deposit for construction of a bikeway along Iron Mountain Boulevard.

FINDINGS AND REASONS

The City Council incorporates the April 5 and April 19, 1993, staff reports and the record established during the public hearings before the DRB and the City Council, as support for its decision. In addition, the Council finds as follows:

1. The original minor partition (SD 56-89) was approved by staff on April 16, 1990, as a "minor development" pursuant to LOC 49.140(1)(H). Minor developments are staff decisions, subject to notice and the opportunity to appeal. Staff imposed a number of conditions of approval on the partition pursuant to LOC 49.620, which allows the City to impose conditions or restrictions on any major or minor development approval in order to protect the public, implement the requirements of the Comprehensive Plan and Chapter 49, and/or to fulfill a need for public services created or increased by the proposal. LOC 49.620(1)(A), (B) and (C). These conditions include: Condition 3, which

required the applicants to sign a non-remonstrance agreement and petition for formation of a local improvement district (LID) for future street improvements along Iron Mountain Boulevard and Chandler Road; and Condition 11, which required the applicants to post a cash deposit for the purpose of constructing a pathway along Iron Mountain Boulevard. The applicants did not appeal SD 89-56, and subsequently executed the non-remonstrance agreement and paid the pathway deposit. The partition was completed, the new parcel (parcel 2) was sold, and a new dwelling was constructed on the new parcel during the summer of 1990. The applicants retained parcel 1, which is occupied by a pre-existing dwelling.

The applicants subsequently filed an application to modify the approved partition by deleting conditions 3 and 11 as applied to Parcel 1. The application was filed pursuant to LOC 49.125. Staff denied the request on January 15, 1993. The applicants appealed the decision to the Development Review Board pursuant to LOC 49.225, which held a de novo hearing and denied the modification on April 19, 1993. Applicants then appealed the DRB's decision to the Council.

2. As noted in the staff report, the non-remonstrance agreement was imposed pursuant to a number of Comprehensive Plan, Development Code and the Development Standard policies and criteria. Specific Policy 4 of General Policy III of the Urban Service Boundary Policy of the Comprehensive Plan requires all new development to be served by an urban level of services, including adequate streets, and requires such facilities to be available or committed to prior to approval of development. In addition, several of the impact management policies cited in the staff report require new development to pay for or ameliorate

impacts to public facilities relating to the development. These policies are implemented pursuant to LODS 14.020(1), which requires all major and minor developments to provide public utilities, including streets [LODS 14.020(1)(h)], to City Standards. The applicants did not contest either the applicability or staff's interpretation of these provisions. The Council concludes that the staff correctly applied and interpreted these provisions.

As noted in the staff report, neither Chandler Road nor Iron Mountain Boulevard meets current City standards in regard to required width, curbs, gutters, storm drainage, sidewalks and pathways. Staff found that the proposed partition would increase use of these streets by increasing the density of development, and therefore would contribute to the need for eventual improvement of the streets. The applicants have the burden of proof pursuant to LOC 49.615(1); they do not contest these findings or conclusions. Based upon the Staff Report the Council concludes that these findings are correct.

Based upon these findings of fact, Staff determined that construction of the road to City standards, or imposition of a condition to ensure future construction of the road to City standards, was necessary to ensure compliance with LODS 14.020 and the applicable Comprehensive Plan Policies and that a condition was therefore authorized by LOC 49.620(1)(B) and (1)(C). Council concurs with this interpretation and application of these provisions.

In reviewing a partition for compliance with these provisions, the Council concludes that the City essentially has three choices: Require the developer to improve half of the substandard street abutting the property to City standards prior to final approval of the partition; require the developer to sign a

non-remonstrance agreement so that the City can be assured of improving the entire street at such time as incremental development makes it necessary; or deny the partition and thereby avoid any additional impact on public facilities. At this point, the Council cannot deny or revoke the partition because the application gives the City jurisdiction over only one of the two lots created pursuant to the original partition and because the additional development which impacts the street has already occurred on the second lot.

As noted in the City Attorney's memorandum in the record, the City typically requires a developer of one or two lots to sign a non-remonstrance agreement to formation of an LID for street improvement, rather than requiring immediate improvement of the street frontage as a condition of development. Such a condition is imposed because it is neither cost effective nor good engineering to construct a half street section abutting just a few lots, and because the impact of such small scale development may not create an immediate need to improve the entire street, even though each such development contributes to creating a future need. Requiring a non-remonstrance agreement allows the City to form an LID, improve the entire road and assess the cost to the benefitted properties at such time as the cumulative impact of such lot by lot development triggers the need to do so. It is made clear on the face of the non-remonstrance agreement, however, that the consideration for the applicants' agreement is the City's waiver of the requirement for immediate construction. For these reasons, the Council concludes that imposing such a condition is more a practical, reasonable and beneficial method for complying with LODS 14.020, LOC 49.620(1) and the Comprehensive Plan than

imposing a condition requiring immediate partial construction or denying the development for failure to comply with LODS 14.020.

The applicants do not contest these findings or rationale; rather, they argue that non-remonstrance agreement is illegal and unconstitutional.

Applicants' primary argument is that the agreement deprives them, or chills their exercise of, free speech and the right to petition government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26, and under the first and First and Fourteenth Amendments of the U.S. Constitution, because it prevents them from objecting to the formation of an LID.

The Council disagrees. Lake Oswego Charter Article IX, Section 37 and LOC Chapter 40 govern formation of LIDS. LOC 40.060 and 40.090 require two public hearings to be held: The first hearing is to determine whether the proposed LID should be formed, draw the appropriate boundaries of the LID, determine the appropriate assessment formula and set the appropriate interest rate. The second hearing is to hear objections to the amount of the assessment. LOC 40.050(1) authorizes affected property owners to file written remonstrances objecting to formation of the LID at the time of the first hearing. If written remonstrances are received from at least two-thirds of the property owners, formation of the LID is suspended for six months. A non-remonstrance agreement waives the property owner's right to file a written remonstrance and thereby potentially delay the project for six months.

LOC 40.050(2), however, expressly authorizes and requires the Council to consider oral objections to the project at

the first hearing. LOC 40.040 expressly requires the published notice to state that oral objections will be considered at the public hearing. LOC 40.060(2) expressly requires the Council to consider any testimony in addition to written remonstrances in deciding whether to proceed with formation of the LID. LOC 40.080(2) and 40.090 notifies and allows "all persons" to testify in objection to the proposed assessments at the second hearing. Regardless of whether a person has waived his or her right to delay the project in a non-remonstrance agreement, such persons are notified of their right to appear, and may appear, before the Council at the first and second public hearings and object to or otherwise testify regarding the LID on the merits. Based upon this express language, the Council concludes that the non-remonstrance agreement condition does not limit the applicants' right to speak on any issue or to seek redress of grievances from the Council in violation of the constitutional provisions cited above.

Applicants alternatively argue that by requiring them to waive their right to delay an LID, the Council is illegally and unconstitutionally requiring them to give up their right to vote in violating of Oregon Constitution Article II Section 1 and 42 USC Section 1502(a)(1), 5 USC Section 1502(a)(1) (The Hatch Act) and ORS 260.665 (the Oregon Corrupt Practices Act). The applicants failed to cite any case law or provisions which would indicate that the ability of a property owner to file a written remonstrance to formation of an LID is an "election" or a "vote" subject to these laws. Based on the advice of the City Attorney, the Council concludes that it is not.

Applicants further argue that the Council can not condition approval of a development permit on the surrender of a

legal right. As noted above, the Council disagrees that any fundamental constitutional right is involved. The right to remonstrate and thereby delay formation of an LID is entirely a creature of the City Charter and Code. The applicants voluntarily applied to the City to partition their property, thereby subjecting their property and proposal to the City land use planning jurisdiction. The applicants could have walked away from the partition rather than sign the non-remonstrance agreement, or could have appealed the condition or asked to be allowed to construct the half-street improvement instead. They did not do so. Instead, they signed the agreement and proceeded with the partition, thereby obtaining a benefit under the City Code and placing an additional burden on the City infrastructure. The City is expressly authorized by LOC 49.620(1)(B) to condition approval by requiring the applicant to alleviate such burdens. The Council concludes that conditioning a permit on the signing of a non-remonstrance agreement is not fundamentally different from conditioning a permit on payment of an impact fee, dedication of a right-of-way, or construction of infrastructure, all of which are allowed under Oregon law.

The applicants finally argued that even if the City has the legal authority to impose the condition, that the City should not do so as a matter of public policy because the condition is too draconian and the rights that the applicants must waive are out of proportion to the development that they requested. The Council disagrees. The only right that the applicants waive is their right to potentially delay an LID for six months, after which the City may proceed with the LID regardless of the number of remonstrances filed. Indeed, by unanimous vote, the Council may waive the remonstrances in case of an emergency implicating the health, safety and welfare of the citizens.

The applicant argued that as a practical matter the filing of sufficient remonstrances generally kills the project. While this may be true in some cases, it is equally likely that substantial opposition to the LID would kill the project even if the City held enough non-remonstrance agreements to force it.

The applicants also argued that the fact that the non-remonstrance agreement runs with the land for twenty years, subject to renewal at the City's option for another twenty years, is a significant restriction. In point of fact, all conditions of approval attached to a land use permit run with the land. LOC 49.020. Such conditions are generally perpetual, unless the condition specifically provides otherwise or unless modified pursuant to the Code. LOC 49.035, 49.040, 49.055, 49.060, 49.065, 49.097, 49.100, 49.125.

Statewide Land Use Planning Goal 11 requires the City to plan for and provide key public facilities, including streets, adequate to serve growth during the planning period. This requirement is echoed and implemented by the City Comprehensive Plan Policies cited above and in the staff report, which also require the City to ensure that development provide and/or pay its equitable share for such facilities. The Council concludes that requiring an applicant for a partition to sign a non-remonstrance agreement to allow future improvement of a substandard City street is reasonably related to mitigating the impacts of the partition on that public facility, and is more practical and less onerous on the property owner than requiring immediate construction of a half-street improvement or denying all development which increases density or intensity of use until the street is improved.

The City Council therefore concludes that condition 3 of SD 56-89 is within the authority of the City to impose pursuant to LOC 49.620(1)(B) and (C), is necessary for the partition to comply with LODS 14.020 and the Lake Oswego Comprehensive Plan, and therefore should not be deleted pursuant to this application.

3. Condition 11, the pathway deposit, was imposed pursuant to much the same Comprehensive Plan and Development Standard authority as the requirement for the non-remonstrance agreement. In addition, LOC 49.620(3)(H) and the Pathway Master Plan expressly authorize the City to require dedication and construction of a pathway or deposit of funds sufficient to construct the pathway. For these reasons, and the reasons expressed in the City Attorney's memorandum of October 23, 1992, the Council disagrees with the applicant's arguments that the City lacked legal authority to impose the deposit, that the deposit violates ORS 223.389 or Section 38 of the Charter, or that the deposit is an unlawful "taking" in violation of Article I Section 18 of the Oregon Constitution or the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Council does, however, find the applicants' public policy arguments against the deposit more compelling. In light of the passage of the Bond Issue in September 1990 to pay for construction of pathways pursuant to the Pathways Master Plan, including the pathway along Iron Mountain Boulevard, the Council concludes that appropriate level of Pathway facilities to serve this development will be provided pursuant to the Comprehensive Plan and LODS 14.020 without having to require or maintain the deposit. Under these circumstances, the Council agrees that maintaining and utilizing the deposit when these properties are

now also paying property taxes to fund the same pathway would be bad public policy, if not unlawful.

For these reasons, the Council concludes that Condition 11 should be deleted, and the pathway deposit should be refunded, along with any interest earned by the City on the deposit, to the applicants.

4. The applicants also request payment of their costs expended in seeking this modification and appeal. The applicants cite no authority in the Code or state law which provides for such award. The Council therefore denies the request. Because the applicants prevail in part on this appeal, however, the Council notes that they are entitled to a refund on the transcript deposit pursuant to ORS 227.180(1)(c).

5. The applicants seek no other modification of SD 56-89 and contest no other portion of the DRB's and Staff Decision. The Council therefore adopts and incorporates the remainder of these decisions by reference.

IT IS ORDERED by the City Council of the City of Lake Oswego that the decision of the Development Review Board in AP 93-05-1025 is **AFFIRMED** in part and **MODIFIED** in part, as follows:

1. Condition of Approval 11 of SD 56-89 is hereby deleted; and
2. The cash deposit paid by the applicants pursuant to condition 11 shall be refunded to the applicants, along with the interest earned by the City on the deposit up to the date of refund.

This Order was presented to and adopted by the City Council of the City of Lake Oswego.

DATED this 7th day of October, 1993.

_____

Heather Chrisman, Council President

ATTEST:

_____

Kristi Hitchcock,
City Recorder

AYES: June, Klammer, Puskas, Anderson, Holstein, Chrisman

NOES: None

ABSTAIN: None

EXCUSED: Schlenker

IN THE SUPREME COURT
OF THE STATE OF OREGON

WILLIAM LARSSON	)	
Petitioner/Petitioner	)	ORDER DENYING
DEBRA LARSSON	)	REVIEW
Petitioner/Petitioner	)	
	)	CA A83141
v.	)	SC S41368
	)	
CITY OF LAKE OSWEGO	)	
Respondent/Respondent.	)	

The Court has considered the petition for review and orders that it be denied.

DATE: September 6, 1994.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

FADELEY, J., NOT PARTICIPATING
DURHAM, J., WOULD ALLOW

COPIES TO:

THOMAS H. NELSON	Attorney for Petitioner/Petitioner
JEFFREY CONDIT	Attorney for Respondent/Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(3).

49.16.050. Violations; abatement; injunction.

1. Any person who fails to comply with, or who violates, any provision of this chapter, or who fails to carry out the terms and conditions of any development approval, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

2. Any development which occurs contrary to the provisions of this chapter or contrary to any permit or approval issued or granted hereunder is hereby declared to be unlawful and a public nuisance, and may be abated pursuant to LOC 34.08.400 to 34.08.490.

3. Upon request of the Planning Director, the City Attorney may institute an appropriate action in any court to enjoin the maintenance of any use, occupation, building or structure which is in violation of any provision of this chapter.

4. The rights, remedies and penalties provided in this chapter are cumulative, are not mutually exclusive, and are in addition to any other rights, remedies and penalties available to the City under any other provisions of law. (Ord. No. 2088, Enacted, 03/03/94)

RESTRICTIVE COVENANT
WAIVING RIGHT OF REMONSTRANCE
FOR STREET IMPROVEMENTS

JUN 26 1990

The undersigned, being the legal owners of the real property described below, do hereby consent to the improvement of the public streets bordering said property. In consideration of not being required to improve the said streets at this time, we hereby expressly waive any and all right to remonstrate against the improvement of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. We irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the improvement, such assessment to be made in accordance with applicable laws and ordinances as the same may exist at the time of the improvement. It is understood that "improvement of streets", as the term is used herein also applies to alleys, and includes construction of curbs and gutters, sidewalks, storm drains, illumination, traffic control devices, and all other work and improvements deemed necessary by the City of Lake Oswego to bring the streets into conformance with applicable improvement standards.

Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The signatures appearing on this document are to be construed as equivalent to signatures appearing on a petition to form a Local Improvement District for the aforesaid purposes.

The covenants herein contained shall be binding upon the undersigned and upon all subsequent owners of said property as covenants running with the land and effective for twenty years from the date hereof; provided, however that the City of Lake Oswego shall have the right to extend the covenants for an additional twenty years by recording a notice of such extension in the deed records of the County in which said property is situated prior to the expiration of the first twenty year period.

The property subjected to these covenants is:

See attached Exhibit A

The following information is for reference purposes only:

Tax Map 21E 3CC	Tax Lot(s)	Site address
		1210 & 1250 Chandler

City of Lake Oswego Public Works and Land Development Service file # SD 56-89.

SIGNATURE(S), OWNER(S) OF RECORD

s/Debra T. Larsson	Debra T. Larsson	6-15-90
Signature	Print Name	Date
s/Robert L. Nelson	Robert L. Nelson	6-26-90
Signature	Print Name	Date

STATE OF OREGON)
) ss.
COUNTY OF Clackamas)

BE IT REMEMBERED THAT on this 15 day of June, 1990, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared the within named Debra T. Larsson who are known to me to be the identical individuals described in and who executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET BY HAND AND SEAL THIS 15 of June, 1990.

s/ Kathryn Miller
Notary Public for Oregon
Commission Expires: 3-19-92

STATE OF OREGON)
) ss.
COUNTY OF Clackamas)

BE IT REMEMBERED THAT on this 25 day of June, 1990, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared the within named Robert L. Nelson who are known to me to be the identical individuals described in and who executed the same freely and voluntarily.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET BY HAND AND SEAL THIS 25 of June, 1990.

s/ Kathryn Miller
Notary Public for Oregon
Commission Expires: 3-19-92

EXHIBIT A - RESTRICTIVE COVENANT

A TRACT OF LAND SITUATED IN THE SW 1/4 OF SECTION 3, T2S, R1E, WM, CLACKAMAS COUNTY, OREGON, BEING LOTS 71-73 AND PT. LOT 74, "FOREST HILLS", BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY RIGHT OF WAY LINE OF CHANDLER ROAD THAT IS N 70°48'26" E 13.81 FEET FROM A 1/2" IRON PIPE AT THE NORTHWEST CORNER OF LOT 74, "FOREST HILLS"; THENCE N 70°48'26" E ALONG SAID SOUTHERLY RIGHT OF WAY LINE OF CHANDLER ROAD, 83.28 FEET TO A 1/2" IRON PIPE; THENCE CONTINUING ALONG SAID SOUTHERLY RIGHT OF WAY LINE ON A CURVE TO THE RIGHT HAVING A RADIUS OF 249.43 FEET THROUGH A CENTRAL ANGLE OF 38°42'04" (LONG CHORD BEARS S 89°50'32" E 165.30 FEET) AN ARC LENGTH OF 168.48 FEET TO A POINT; THENCE S 70°29'00" E 101.66 FEET TO A 1/2" IRON PIPE; THENCE SOUTHEASTERLY ON A CURVE TO THE RIGHT HAVING A RADIUS OF 117.68 FEET THROUGH A CENTRAL ANGLE OF 70°30'35" (LONG CHORD BEARS S 35°13'43" E 135.85 FEET) AN ARC LENGTH OF 144.82 FEET TO A POINT OF COMPOUND CURVE IN THE WESTERLY RIGHT OF WAY LINE OF IRON MOUNTAIN BOULEVARD; THENCE ALONG THE WESTERLY RIGHT OF WAY LINE OF IRON MOUNTAIN BOULEVARD ON A CURVE TO THE RIGHT HAVING A RADIUS OF 250.00 FEET THROUGH A CENTRAL ANGLE OF 56°09'32" (LONG CHORD BEARS S 27°56'51" W 235.35 FEET) AN ARC LENGTH OF 245.04 FEET TO THE SOUTHWEST CORNER OF LOT 71, "FOREST HILLS"; THENCE LEAVING THE NORTHWESTERLY RIGHT OF WAY LINE

OF IRON MOUNTAIN BOULEVARD, N 44°55'21" W (PLAT N 45°00'00" W) ALONG THE NORTHEASTERLY LINE OF LOT 70, "FOREST HILLS" 257.24 FEET (PLAT 256.99 FEET) TO A 1/2" IRON PIPE AT THE NORTHEAST CORNER OF SAID LOT 70; THENCE N 41°16'24" E 191.29 FEET TO THE PLACE OF BEGINNING.

Order No. 855229 C
Legal Description

EXHIBIT "A"

A tract of land situated in the Southwest one-quarter of Section 3, Township 2 South, Range 1 East of the Willamette Meridian, in the County of Clackamas and State of Oregon, being a part of Lots 73 and 74, according to the duly filed plan of "FOREST HILLS", being more particularly described as follows:

Beginning at a 1/2 inch iron pipe at the Northeast corner of Lot 70, "FOREST HILLS", which 1/2 inch iron pipe is in the Southwest line of Lot 74, "FOREST HILLS"; thence leaving said Southwest line of Lot 74, North 41°16'24" West 25.00 feet to a 5/8 inch iron rod and the true place of beginning; thence North 65°11'20" East 84.52 feet to a 5/8 inch iron rod; thence North 00°56'57" West 129.66 feet to a 5/8 inch iron rod in the Southerly right of way line of Chandler Road; thence Westerly along said Southerly right of way line on a curve to the left having a radius of 249.43 feet through a central angle of 24°37'27" (long chord bears South 83°07'10" West 106.38 feet) an arc distance of 107.20 feet to a 1/2 inch iron pipe, thence South 70°48'26" West 83.28 feet to a 5/8 inch iron rod, said 5/8 inch iron rod bears North 70°48'26" East 13.81 feet from a 1/2 inch pipe at the Northwest corner of said Lot 74; thence leaving said Southerly right of way line of Chandler Road, South 41°16'24" East 166.29 feet to the true place of beginning.

STOEL RIVES BOLEY
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Telex 703455
Writer's Direct Dial Number
(503) 294-9281

September 3, 1992

Michael R. Wheeler
Associate Planner
Department of Planning and Development
CITY OF LAKE OSWEGO
380 A Avenue
P.O. Box 369
Lake Oswego,OR 97034

Re: William and Debra Larsson

Dear Mr. Wheeler:

In response to your letter of August 13, 1992, I am enclosing an original and seven copies of a completed application for minor changes in the Larsson's development permit in File No. 56-89. The $400 filing fee was tendered by letter dated July 24, 1992.

Please let me know what further steps are necessary to move this application forward.

Thank you for your attention, and we look forward to working with you on this matter.

Very truly yours,

s/Thomas H. Nelson

Thomas H. Nelson

Enclosure: Application
cc: William & Debra Larsson

ADMINISTRATIVE REVIEW
for
MINOR CHANGES TO DEVELOPMENT PERMITS

OWNER
Name William and Debra Larsson
Address 1210 Chandler Road
City Lake Oswego State OR Zip 97034
Signature _____
Phone 636-2887

* APPLICANT
Name Thomas H. Nelson
Company STOEL RIVES BOLEY
Address 900 S.W. Fifth Avenue
City Portland State OR Zip 97024
Phone 294-9281

DESCRIPTION OF PROPERTY (TOTAL PROPERTY)
TAX MAP 2 1E 3CC TAX LOTS(S) 3400
LOT SIZE Orig: 86,058 sq. ft.
(Acres/Sq. Ft.)
OR
LEGAL DESCRIPTION, METES AND BOUNDS (ATTACH COPY) PLAT NAME _____ LOT _____ BLOCK _____

USE
EXISTING Residential PROPOSED Same

PROPERTY OWNERSHIP LIST
If necessary, attach a list of the names and addressed of the owners and renters of properties located within 200 feet of

*If the applicant is not the property owner, he must attach documentary evidence of his authority to act as agent in making application.

the subject property. Lists of property owners may be obtained from any title insurance company or from the County Assessor. If the property ownership list is incomplete, this may be cause for postponing the hearing or administrative decision.

USE

EXISTING Residential PROPOSED Same

EXISTING STRUCTURE(S) House, Guest House, and Green House (shown on Ex. 1)

PROJECT DESCRIPTION

Recover bikepath exaction and remove nonremonstrance agreement from chain of title through determination that conditions imposing same were illegal. Zoning: R-10

ZONING

COMPREHENSIVE PLAN DESIGNATION

NEIGHBORHOOD ASSOCIATION None

PREVIOUS ACTION Application to create two parcels approved 4/16/90.

DO NOT WRITE BELOW THIS LINE

FILE NO. _____	PRE-AP MEETING _____
RECEIPT NO. _____	DRB OR PC HEARING _____
RECEIVED BY _____	ADMINISTRATIVE DECISION ____
DATE RECEIVED ____	FINAL ACTION TAKEN _____
COMPLETENESS CHECK DATE_____	PROJECT COORDINATOR _____

I consent to an on-site inspection by an employee of the City of Lake Oswego. Attorney for

Date Sept. 2, 1992 Property Owner's Signature s/Thomas H. Nelson

Date _____ Property Owner's Signature_____

Revised 5/8/91

NARRATIVE STATEMENT ACCOMPANYING APPLICATION FOR MINOR CHANGES TO DEVELOPMENT PERMIT

Introduction

By a pleading dated May 1, 1992, William and Debra Larsson moved to reopen a prior land use decision in File No. 56-89. A copy of that motion is attached hereto as Exhibit 1. In response, by letter dated May 27, 1992, Michael R. Wheeler, Associate Planner, informed the Larssons that the appropriate procedure to reopen the referenced decision and to address the merits of the issue would be by application for minor changes to development permits. A copy of Mr. Wheeler's letter is attached hereto as Appendix 2. Mr. Wheeler also informed the Larssons that the filing fee for such an application was $400. On July 24, 1992 the Larssons, through their attorney, submitted a document titled "Application for Minor Changes to Development Permit," together with the $400 filing fee. On August 13, 1992, Mr. Wheeler wrote to Mr. Nelson stating that the City required

> "a completed application form, site plan, supporting graphics, and narrative. The narrative must include a description of how the proposed modification complies with LOC 49.124 (1-4), applicable provisions of the Development Code, Development Standards, and other development-related ordinances. The Application must be signed by the property owner or written evidence of your authority to act as agent must be provided."

This revised application and narrative summary accompanies the one-sheet "Application for Administrative Review for Minor Changes to Development Permits." Written authorization for

Mr. Nelson to represent the Larsson in this matter is attached to the one-sheet application form submitted herewith.

A site plan and supporting graphics are attached hereto as Exhibit 1.

Narrative

First, addressing LOC 49.125 (1-4), the Larssons contend:

(1) The change requested herein will not increase the intensity of any use, or the density of residential use, of land, and

(2) The change requested herein meets all requirements of all legal development standards and other requirements legally imposed; in fact, the reason that this application is submitted is to determine the legality of two existing requirements that Applicants believe to be illegal; and

(3) The change requested herein will not significantly affect other property or uses, will not cause any deterioration or loss of any natural feature, process or open space, and will not significantly affect any public facility; and

(4) The change requested herein does not affect any condition specifically placed on the development by action of a hearing body or City Council. (The prior action was administrative in nature.)

The application does not seek to change any existing use of land. Rather, it seeks a determination of the legality of two conditions it attached to its approval of their application to create

two parcels from one parcel of lane, viz., (1) the legality of the exaction of over $5000 to fund a bikepath along Iron Mountain Boulevard (condition 11), and (2) the legality of a "non-remonstrance agreement" (condition 3). Applicants contend that both of these conditions are illegal.

(1) The Bikepath Exaction. Applicants contend that the bikepath exaction was illegal and unconstitutional. Specifically, the exaction appears to be a violation of ORS 223.389 (imposition of special assessments by resolution or ordinance), Section 38 of the Lake Oswego City Code (imposition of special assessments by ordinance), Article I, Section 18 of the Oregon Constitution (taking of property without just compensation), and the fifth and fourteenth amendments to the Constitution of the United States (taking of property without due process of law). The Larssons seek a refund of all bikepath funds paid to the City, plus statutory interest.

(2) The Nonremonstrance Agreement. Applicants contend that the nonremonstrance agreement was illegally obtained and is both illegal and unconstitutional. In essence, the non-remonstrance agreement requires that Applicants forfeit civil and political rights in return for development authorizations. It is a longstanding principle of law that governmental benefits may not be conditioned upon the surrender of constitutional rights. More specifically, the agreement deprived Applicants' right to, and chilled their exercise of, free speech and the right to petition the government for redress of grievances under Oregon Constitution Article I, Section 8 and Article I, Section 26 and under the first and fourteenth amendments to the United States Constitution; it deprived them of their right to free elections as specified in Article II, Section 1 of the Oregon Constitution and under 42 USC § 1973(a); it is preempted by 5 USC § 1502(a)(1) (the Hatch Act),

and it is in violation of the Oregon Corrupt Practices Act, ORS 260.665.

Applicants intend to provide full legal analyses backing these claims once this application is processed and this proceeding moves forward.

Applicants William and Debra Larsson look forward to working with the City on this matter.

DATED: September 3, 1992.

Respectfully submitted,

Thomas H. Nelson
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Ste. 2700
Portland, OR 97204
Telephone: (503) 294-9281

Of Attorneys for Applicants

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAM AND DEBRA LARSSON,	)	Supreme Court No. S41368
	)	LUBA No. 93-174
	)	Court of
Petitioner-Appellants,	)	Appeals No. A83141
	)	
v.	)	PETITIONER-APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES
	)	
CITY OF LAKE OSWEGO,	)	
	)	
Respondent-Appellee.	)	

Petitioners William and Debra Larsson respectfully wish to call the Court's attention to the recent decision by the Supreme Court of the United States, Florence Dolan v. City of Tigard, ___ US ___, ___ S Ct ___, ___ L Ed 2d ___, 94 US LEXIS 4826 (June 24, 1994). That case stands for the proposition that, in order to avoid an unconstitutional taking, there must be a proportional relationship between the burden inflicted by development and the property rights demanded as a condition of development. A copy of that opinion is attached as Exhibit 1. That decision reversed the prior opinion of this Court, Dolan v. City of Tigard, 317 Or 110, 854 P2d 437 (1993), and remanded the matter for further proceedings; as a result, a detailed discussion of the facts and issues involved in Dolan does not seem warranted.

One aspect of the U.S. Supreme Court's decision does, however, bear emphasis. In their Petition for Review, Petitioners claimed that the City of Lake Oswego's requirement that a

nonremonstrance agreement be provided as partial consideration for a development permit is an unconstitutional condition. Interestingly, the U.S. Supreme Court's decision addresses the doctrine of unconstitutional conditions:

> "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Ed. of Township High School Dist. 381 U.S. 563, 568 (1968).*"

Exhibit 1 at page 5. Because there is no demonstrated nexus between Petitioners' development and the nonremonstrance

agreement, Petitioners assert the nonremonstrance agreement must be invalidated on the basis of Dolan.

DATED: June 28, 1994.

Thomas H. Nelson, OSB No. 78315
STOEL RIVES BOLEY JONES & GREY
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Attorney for Petitioner-Appellants
William and Debra Larsson